IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.CJ.

NOTICE OF MOTION NO.2851 OF 2005
IN
CROSS OBJECTIONS/APPEAL STAMP NO. 11 OF 2005
IN
APPEAL NO.589 OF 1994
IN
SUIT NO.891 OF 1970

Kesharwani Co-operative Housing Society Ltd. .. Appellant
v/s.
Bomi Manchershaw Mistry and others .. Respondents

Mr. J.B. Chinoy, senior counsel with Mr. Sanjay Jain and Mr. Swapnil Bangur i/by M/s. Dhruve Liladhar for the Appellant.

Mr. R.A. Dada, senior counsel with Mr. D.J. Khambatta i/by M/s. Payne & Co. for the respondent No.1 (original appellant in appeal No.589 of 1994).

Mr. F.E. D' Vitre, senior counsel i/by Gagrats for the respondent Nos.2 and 3A.

CORAM : R.M.LODHA &
S.A.BOBDE, JJ.

DATED : 18TH SEPTEMBER, 2006.

P.C.

We heard the senior counsel for the parties.

2. Suit No.891 of 1970 filed by the appellant- Bomi Manchershaw Mistry (plaintiff) was decreed by the learned trial

Judge on 3.12.1992 against Kesharwani Co-operative Housing Society Limited (defendant No.1) thus-

> (i) Declared that Defendant 1 is not the owner of the land shown by yellow batched lines in Ex. B (being an annexure to the plaint) and that this land belongs to the trustees, the beneficiaries and the reversioners (including plaintiff) of the deed of settlement dated 17.3.1951. Defendant 1 is permanently prohibited from laying any claim to this land or interfering with the possession and enjoyment thereover of the trustees, beneficiaries and reversioners inclusive of plaintiff aforementioned.
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> (ii) Defendant 1 is prohibited from erecting any structure exceeding in height 13' 1.1/2" on the vacant land of the erstwhile Ratan Villa as it was on 20.3.1951. This prohibition, which shall be perpetual is restricted to the said land whether buildable or otherwise according to building regulations of any authority – then or now in force. Declared that this restraint shall operate perpetually in favour of the trustees, beneficiaries or reversioners including plaintiff and/or their successors as the case may be. Defendant 1 do remove from the land vacant as on 20.3.1951 any structure put up after 20.3.1951 in Ratan Villa campus. This removal be effected in six weeks as from this day. In the event of the above directive not being complied with, plaintiff will be entitled to get an order for such removal in execution and the expense therefor shall be saddled upon defendant 1.
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> (iii) Defendant 1 perpetually restrained from putting up any structure or cluttering up with mobile objects the portion in front towards south, the central passage or garden shown in bunt-sienna colour in Plan B to Ex.B dated 20.3.1951.

This area shall be kept unbuilt upon and in the state it was on 20.3.1951.

(iv) Ex. B to the plaint and Plans A and B to Ex.B dated 20.3.1951 shall form part of the decree. Plaintiff to furnish copies of the said exhibit and plans.

(v) Plaintiff to get 3/4ths of his costs from defendant 1 and bear the remaining 1/4ths himself. Defendants do bear their own costs."

3. The plaintiff was aggrieved to the limited extent of the judgment and the decree dated 3rd December, 1992 and preferred the appeal against the following part:-

"(i) in so far as the Learned Judge has restricted the prohibition against Respondent No.1 (original Defendant No.1) from erecting any structure exceeding in height 13'-1.1/2" only to "the vacant land of the erstwhile Ratan Villa as it was on 20.3.1951", and has negated the contention of the Appellant (Original Plaintiff) that on a true construction of the suit covenant, the decree for perpetual and mandatory injunctions and declarations as prayed ought to have been granted, and

(ii) in so far as the Learned Judge has recorded certain findings against the Appellant (original Plaintiff) as particularised in Sub-para I(B) below."

4. The said appeal was admitted on 8.9.1994 and notice of appeal was issued on 29.9.1994. The notice of appeal was served upon Mr. K.K. Tated, advocate for the defendant No.1-society on

27.10.1994.

5. The appeal came up for hearing on various dates from 8.4.1999 to 29.6.2005 alongwith appeal No.590 of 1994. Appeal No.590 of 1994 was heard on 13th, 14th and 15th June, 2005 and the judgment was pronounced on 29th June, 2005. At the time of hearing of the appeal No.590 of 1994, the categorical representation was made on behalf of the defendant No.1-society that the society has accepted the decree passed in suit No.891 of 1970. Now, almost after 11 years of the judgment and decree, the society seems to have turned around and filed the cross-objections in the appeal preferred by the plaintiff with an application for condonation of delay; this is what has come up for consideration before us today.

6. That the conduct of the defendant No.1-society in filing cross-objections now is not bonafide, is clearly seen from the fact that in the other appeal being appeal No.590 of 1994 arising out of Suit No.942 of 1973, an unequivocal statement and representation was made to the court on behalf of the defendant No.1 that they have accepted the judgment and decree passed in suit No.891 of 1970. That the society accepted the judgment and decree dated 3rd December, 1992 was also apparent that time because the society has not challenged the judgment and decree dated 3rd December, 1992 all these years.

7. Order 41 Rule 22 of the Code of Civil Procedure enables the respondent to take cross-objection to the decree and the

finding against him within one month from the date of service on him or his pleader of the appeal or within such further time as the appellate court may deem fit to allow. Order 41 Rule 22 reads thus:

> "22. **Upon hearing, respondent may object to decree as if he had preferred separate appeal**.- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.
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> [Explanation.-A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]
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> (2) **Form of objection and provisions applicable thereto.**- Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.
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> [***]

> (4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.
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> (5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule."

8. We find no justification to extend the time for filing cross-objections and condone the delay of almost 11 years. For one, the defendant No.1-society represented to the court at the hearing of the appeal No.590 of 1994 that they have accepted the judgment and decree dated 3rd December, 1992 passed in suit No.891 of 1970. The other If the society wanted to challenge the judgment and decree dated 3rd December, 1992, they could have done so by preferring appeal or by filing cross objections as soon as the notice was served on their advocate Mr. K.K. Tated but they never chose to do so. Obviously, they did not do so because the society had accepted the said judgment and decree. In our considered view, the delay of more than 11 years in filing the cross-objections does not deserve to be condoned particularly when the defendant No.1-society had already accepted the judgment and decree. For what we have noticed above, this is not fit case to allow the defendant No.1 to file cross-objections after 11 years.

9. The submission of the senior counsel for the defendant

No.1-society that the disputes had arisen between the members of the Managing Committee in the year 1992 and the injunction orders were operating against the members of the Managing Committee and because of that, the cross-objections were not filed earlier does not deserve to be accepted. The injunction orders were not perused by us. These orders were no impediment in filing the appeal/cross-objections against the said judgment and decree dated 3rd December, 1992 as no major policy decision was involved in it. The appeal/cross objections against the judgment and decree dated 3rd December, 1992 were not filed by the society because the society had accepted the said judgment and decree. Now after the judgment was passed by this Court in appeal No.590 of 1994 on 29th June, 2005, the society has taken somersault and filed the present cross-objections alongwith the notice of motion for condonation of delay.

10. We, accordingly, dismiss the notice of motion for condonation of delay. Upon dismissal of the notice of motion, cross-objections stand dismissed being barred by limitation.

(R.M.LODHA, J.)

(S.A.BOBDE, J.)